IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-507

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WILFRED KEYES, *et al.*,

*Petitioners,*

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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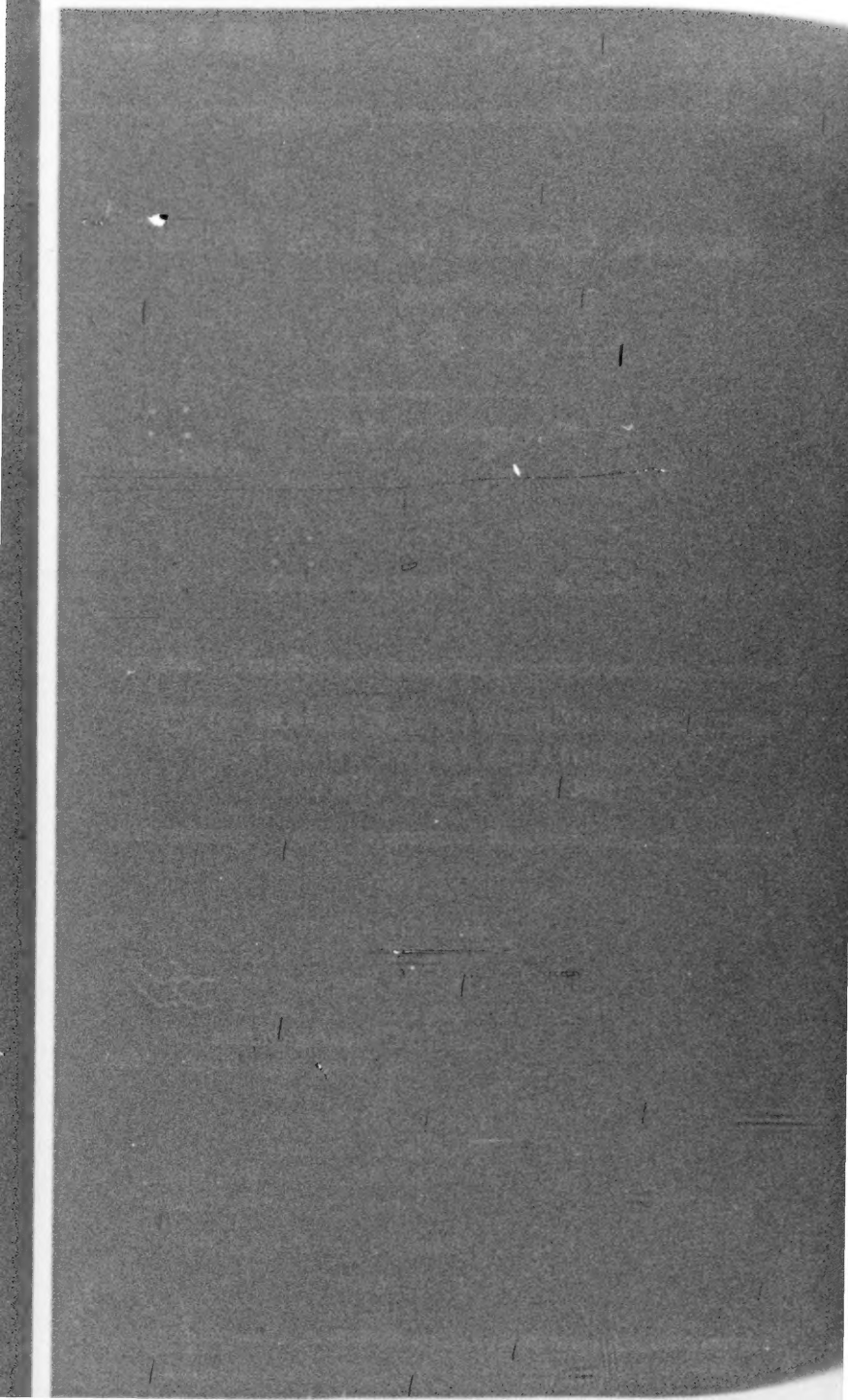

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on June 11, 1971.

### Opinions Below

The June 11, 1971 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 445 F.2d 990 and is reprinted in the separate Appendix to this Petition, pp. 122a-158a. The prior opinions of the United States District Court for the District of Colorado, also reprinted in the Appendix, are reported as follows: (1) July 31, 1969, granting petitioners' motion for preliminary injunction, 303 F. Supp. 279 (Appendix, pp. 1a-19a); (2) August 14, 1969, on remand to make preliminary injunction more specific and consider applicability of portion of Civil

*Plaintiffs' Exhibit 20*

(Map)

(See Opposite)

Rights Act of 1964, 303 F. Supp. 289 (Appendix, pp. 20a-43a); (3) March 21, 1970, opinion on merits granting permanent injunction, 313 F. Supp. 61 (Appendix, pp. 44a-98a); and (4) May 21, 1970, opinion on relief or remedy, 313 F. Supp. 90 (Appendix, pp. 99a-121a).

## Jurisdiction

The judgment of the Court of Appeals was entered June 11, 1971. On September 8, 1971, Mr. Justice Marshall entered an order extending the time for the filing of this petition to and including October 9, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## Constitutional and Statutory Provisions Involved

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Question Presented

Whether school authorities who have over several decades created and aggravated school segregation and minimized school integration, and whose policies and practices systematically afford white students greater educational oppor-

tunities than black or Spanish-surnamed students attending segregated schools, must take all possible affirmative steps to eliminate segregation throughout their school system and otherwise equalize educational opportunity.

## Statement of the Case

This is a school desegregation action brought by Denver schoolchildren and their parents on June 19, 1969 pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4). While the litigation followed a newly elected school board's cancellation of a partial desegregation plan adopted by the predecessor board, the complaint sought the complete desegregation of the Denver public school system and provision of equal educational opportunities to all Denver schoolchildren.[1]

### The Denver School District

The respondent school district is coterminus with the City and County of Denver, Colorado. During the 1968-69 school year—immediately preceding this lawsuit and prior to implementation of the preliminary injunction (303 F. Supp. 279, 289)—the school district operated 118 schools[2] serving 96,577 children. Denver students include significant

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[1] Petitioners' Complaint alleged, *inter alia* (First Count, Second Cause of Action) (emphasis supplied):

> B. By the following described acts, *among others*, defendants and/or their predecessors have over the years and are at present deliberately and purposefully attempting to create, foster and maintain racial and ethnic segregation within the School District; . . .
>
> C. These various actions of said defendants have effected in the School District a significant segregation of pupils by race and ethnicity. . . .

[2] Nine senior high schools, 17 junior high schools and 92 elementary schools.

numbers of Negro (12.0-15.2%) and Spanish-surnamed (15.2-23.1%) children.[3]

During the 1968-69 school year (prior to this suit) there was substantial segregation of students in the Denver public schools, as shown by the following table:

| *Students Attending Schools:* | *White Students* | | *Black Students* | | *Spanish-surnamed Students* | |
|---|---|---|---|---|---|---|
| | *No.* | *%* | *No.* | *%* | *No.* | *%* |
| 0-25.0% white | 1778 | 2.8% | 10110 | 74.2% | 6174 | 31.6% |
| 25.1-50.0% white | 2931 | 4.6% | 797 | 5.8% | 3885 | 19.9% |
| 50.1-75.0% white | 12075 | 19.0% | 1848 | 13.6% | 5469 | 28.0% |
| 75.1-100% white | 46635 | 73.5% | 877 | 6.4% | 4001 | 20.5% |
| | 63419 | | 13632 | | 19529 | |

**The Evidence**

This pattern of segregated schooling had persisted for a considerable time in Denver.[4] Much of the evidence demon-

[3] The following table shows the distribution of Denver schoolchildren by race and grade level:

| | *White* | | *Negro* | | *Spanish-surnamed** | |
|---|---|---|---|---|---|---|
| | *No.* | *%* | *No.* | *%* | *No.* | *%* |
| Sr. High (10-12) | 14,852 | 72.8 | 2,442 | 12.0 | 3,091 | 15.2 |
| Jr. High (7-9) | 14,855 | 68.8 | 2,898 | 13.4 | 3,858 | 17.8 |
| Elementary (K-6) | 33,678 | 61.7 | 8,304 | 15.2 | 12,594 | 23.1 |

* Statistics include children of "Other" races in this category; such children constitute 1% of total student enrollment in school district.

[4] Perception of the problem led previous school boards to appoint two committees to recommend solutions, see n. 8 *infra*, and to adopt the plan to desegregate several Denver schools which was annulled by the new board on June 9, 1969 and then reinstated by the district court's preliminary injunction. The district court's order was itself vacated by the United States Court of Appeals for the Tenth Circuit and subsequently reinstated by order of Mr. Justice Brennan. *See Keyes* v. *School Dist. No. 1, Denver*, 396 U.S. 1215 (1969).

strated Denver's use of the now familiar galaxy of techniques by which boards and administrators have sought to preserve school segregation.

Prior to 1950, almost every secondary school and several elementary schools in Denver had "mandatory" attendance zones immediately surrounding them and larger "optional zones" between them; students living in an "optional zone" were permitted to attend either school serving it (PX 20 at p. A-12).[5] While there are no records in evidence showing the use made of this device prior to 1950, thereafter it caused continued attendance of minority-race students at predominantly minority-race schools and avoidance of such schools by white students (H. 63, 78, 112-14; PX 401, 406).

Before 1950, the black and Spanish-surnamed population of Denver generally occupied older portions of the central city.[6] Negroes were concentrated in a well-defined area surrounding the "Five Points," 303 F. Supp. at 282, Appendix at p. 4a. Most of the public schools located within this area were predominantly, if not completely, Negro. *Ibid.* Virtually all of the city's Negro high school students attended Manual High School although their numbers were small enough that the high school was not majority-black; the school also enrolled many Spanish-surnamed students but at that time was the only high school in the Denver

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[5] Citations to the transcript of the hearing on preliminary injunction held in July, 1969 will be given as "P.H. ——." Citations to the transcript of the February, 1970 hearing on the merits will be given as "H. ——." Citations to the transcript of the May, 1970 hearing on relief will be given as "R.H. ——." Exhibits will be identified by reference to the party below introducing them; i.e., "PX ——" and "DX ——" for plaintiffs' and defendants' exhibits, respectively.

[6] Prior to this Court's decisions in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) and *Barrows* v. *Jackson*, 346 U.S. 249 (1953), Colorado courts enforced racially restrictive covenants. *E.g.*, *Chandler* v. *Ziegler*, 88 Colo. 1 (1930); *Steward* v. *Cronan*, 105 Colo. 393 (1940).

school system with a minority of white students (H. 78, PX 401).

At the same time and until at least 1964, it was the policy of the Denver school authorities to assign black and Spanish-surnamed teachers to the schools in which black and Spanish-surnamed students were concentrated.[7] The result was that while no school had a majority of black or Spanish-surnamed teachers, almost all of these teachers were concentrated in a few schools, while most schools had no minority-race teachers (H. 2011-14). This concentration in fact continued through the 1968-69 school year just prior to the institution of this suit (PX 254, 256, 258).

Following 1950, Denver's population increased markedly. Undeveloped areas were settled and new territory added to the city by a large number of annexations. Schools were constructed in these areas; they opened as and have remained virtually entirely white. Both the Spanish-surnamed and black communities expanded, the latter along a narrow corridor eastward from the "Five Points" area. 303 F. Supp. at 282, Appendix at p. 4a.

Respondents' school construction policies traced these patterns and accelerated the isolation of students into racially identifiable schools: In 1953 the system replaced Manual High School—already minority-white and enrolling almost all of the city's Negro high school students—with a new facility located two blocks away, serving the

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[7] The school district defended this policy, despite its segregation of school faculties, on the ground that it furnished successful "role models" for minority race students to emulate (H. 2013-14). The district court found, however, that the system's faculty assignment policies were generated by a fear that the white community would not accept the placement of minority-race teachers in white schools, 303 F. Supp. at 284, Appendix at p. 9a-10a. On appeal, the Tenth Circuit ignored this finding and instead accepted the school district's justification. 445 F.2d at 1007, Appendix at p. 150a.

same mandatory attendance area and limited in size to serve only the black and Spanish-surnamed students in that area or anticipated to be added thereto by population growth (H. 78, 296; PX 401). In 1960 the Barrett Elementary School was built in a black neighborhood at the extreme eastern edge of the Negro residential area but its size was restricted and its boundaries manipulated—its easternmost boundary ran along its playground—to conform to existing residential patterns and insure that it would be a black school from its opening (303 F. Supp. at 282; Appendix at p. 5a). The Manual and Barrett sites were selected and constructed over the opposition of representatives of the black community.[8]

Changes in attendance areas of Denver public schools, for the ostensible purpose of relieving overcrowding at various schools, also resulted in maintaining or exacerbating segregations: In 1952, optional areas were instituted between an overcrowded, increasingly black elementary school (Columbine) and adjacent, underutilized, totally white facilities (Harrington and Stedman)—relieving the overcrowding slightly by permitting the white students at Columbine to withdraw (H. 106-07, 112-14; PX 406). In 1956 overcrowding at East High necessitated adding part of the Manual-East optional area to the mandatory zone for a still-under-capacity Manual. However, the change in-

[8] Similar opposition to the announced 1962 plan to build a junior high school at the Barrett site, in fact, led to the appointment of the first of two committees to investigate "the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors. . . ." That committee, reporting in 1964, "criticized the Board's establishing of school boundaries so as to perpetuate the existing de facto segregation 'and its resultant inequality in the educational opportunity offered'." 303 F. Supp. at 283, Appendix at p. 6a. The second group made its report in 1967 and "noticed the intensified segregation in the northeast schools and recommended that there be no more schools constructed in northwest Denver." *Ibid.*

corporated only the established black residential portion of the optional area (H. 291, 296) although enlarging the Manual High zone still more would have better utilized both schools' capacity, made better use of public transportation lines (which ran directly from the remaining optional area to Manual) and also resulted in desegregation (H. 281-86). A change similar in operation and effect was made the same year between the two feeder junior high schools for Manual and East: Cole (black)[9] and Smiley (white), respectively. Both proposals were resisted before the school board by representatives of the black community because they would segregate.[10] Similarly, in 1962 and 1964, boundary changes for Stedman Elementary School (where Negro enrollment was increasing) were made, purportedly to relieve overcrowding. But only predominantly white areas of the Stedman zone were shifted to white schools; alternative rezoning plans which would both have avoided concentration of black students at Stedman as well as have relieved its capacity problem were rejected (303 F. Supp. at 285, Appendix at p. 11a). Finally, Boulevard Elementary School was turned into a school enrolling a majority of Spanish-surnamed students in 1961 when, in

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[9] As in the case of Manual, Cole enrolled almost all of the school system's black junior high school students at this time.

[10] The school district had previously constructed an addition to relieve overcrowding at Smiley in 1952 rather than adjust its boundary with Cole, which was then underutilized (PX 215, 215A). The same thing occurred in 1958 when Smiley was again enlarged (PX 215).

Overcrowding at East High School was relieved by the construction of a new George Washington High School in 1960, while Manual remained underutilized (PX 210). The new George Washington High attendance boundaries took only whites from East (PH 547-49; PX 20, Map No. 7). In 1964 the adjustment in the East-George Washington boundary, supposedly made to create a more heterogeneous school population at George Washington (PH 547-49), took 200 white students and only 9 black students from East (PX 585-86).

response to a decrease in capacity caused by the demolition of an older section of the facility, a white portion of its attendance area was transferred to the adjacent and overwhelmingly white Brown Elementary School (H. 115-26).

There were also boundary alterations apparently unrelated to any pressing capacity problems. For example, in 1962 all optional zones surrounding Morey Junior High School were eliminated. White portions of the former optional zones between Morey and Byers, to its south,[11] were added to the Byers zone; black areas between Cole[12] or Baker[13] (to the north) and Morey were added to Morey, resulting in the immediate transformation of the school enrollment from majority- to minority-white (313 F. Supp. at 71-72, Appendix at pp. 63a-64a). Similarly, Anglo areas were transferred from Hallett to Phillips in 1962 and 1964; in the latter year, this was accompanied by the transfer of a black area from Stedman to Hallett (PX 75, 76). Again, the effect was to accelerate and emphasize the rapid transformation of Hallett into a racially isolated minority school.

When Denver first utilized mobile classrooms in 1964, 28 of 29 such portable buildings were located in the increasingly black Park Hill area,[14] where they effectively contained an expanding black population (303 F. Supp. at 285; Appendix at p. 11a). At the same time, overcrowding in other (but predominantly white) schools in Denver was met by school board transportation of students—sometimes

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[11] At this time Byers was an all-white junior high school while Morey, prior to the changes discussed in text, was predominantly white.

[12] See n. 9 *supra*.

[13] Baker was predominantly white but with a significant minority-race enrollment.

[14] The remaining portable was placed at a school attended by a majority of Spanish-surnamed students (PX 101).

across the width of the school district—to other (white) schools where capacity was available (P.H. 540-41)[15] despite somewhat closer available capacity at (predominantly minority) schools in the central or core city (P.H. 544). The school district's excuse for busing whites to only white schools was its desire to maintain low pupil-teacher ratios at minority schools in order to offer compensatory programs; its explanation for the creation of extra capacity for black students in black Park Hill schools by the addition of portables was that black parents surveyed at the time preferred it to one-way busing back to the core city area (H. 479-81).

Finally, when in 1964 the district eliminated all optional attendance zones (in accordance with the recommendation of the committee investigating educational opportunity for minority students, see n.8 *supra*, which found that optional areas intensified segregation), it substituted a "limited open enrollment" policy. The only limit of this policy was the availability of space in the various schools; it was the equivalent of free choice and under it Denver permitted wholesale minority-to-majority transfers until it was finally repealed in 1969 (H. 126-32; PX 99, 100).

The result was a school system marked by intense racial and ethnic separation.[16] The proof also demonstrated to the satisfaction of the district court that the Denver public schools were also systematically disadvantaging their black

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[15] Much of the overcrowding was due to annexations of additional areas contiguous to existing schools. But, even after new schools were constructed in the annexed territory, the space in the former receiving schools was not used to accommodate—and integrate—the overcrowding in the Park Hill schools. Thus, whereas prior to the construction of the Traylor Elementary School, some 400 white students were bused across the district to the University Park School, after Traylor was completed, only 36 Park Hill students were transferred to University Park (PH. 543).

[16] *Cf.* p. 4 *supra*.

and Spanish-surnamed students educationally. Most of these students attended all- or predominantly minority schools which lacked various tangible measures of educational quality. The facilities themselves were generally among the oldest and smallest in the district, the faculty generally had less teaching experience in the system than faculties at white schools, and the faculty turnover rates at these schools were highest (303 F. Supp. at 284-85; 313 F. Supp. at 79-80; Appendix at pp. 9a-10a; 80a-81a). At the same time, various objective measures of educational attainment indicated that the students in these schools were suffering: they had higher dropout rates and consistently (and drastically) lower mean achievement test scores than other schools. Finally, expert testimony offered by plaintiffs explained these results not just in terms of the tangible differences among the schools, but the intangible effects of school board policies—such as the concentration of the less-experienced minority-race teachers in these schools—as well: low pupil and teacher morale, feelings of isolation and inferiority affecting motivation, etc.

**The Rulings Below**

The district court ruled, 303 F. Supp. 279, 289, Appendix, pp. 1a, 20a, that the respondents had acted unconstitutionally in cancelling their prior desegregation plan, and that schools in the northeast Denver (Park Hill) area which would have been affected by the plan were segregated because of the school district's "segregation policy." The court, therefore, preliminarily enjoined respondents to implement the terms of their original plan, as originally scheduled, commencing with the 1969-70 school year.[17, 18]

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[17] However, the district court stated explicitly that the school board could still adopt and implement another plan "embodying the underlying principles" of the withdrawn plan, if it so desired.

[18] See n. 4 *supra*.

These findings were carried forward in the district court's opinion on permanent relief, 313 F. Supp. 61, Appendix, p. 44a. However, as to other Denver schools, the district court ruled that there had been no sufficient showing of a segregation policy, although the court admitted that "[a]s to these schools, *the result* is about the same as it would have been had the administration pursued discriminatory policies. . . ." 313 F. Supp. at 73; Appendix at pp. 66a-67a (emphasis supplied). The same practices regarding school construction, boundary changes, additions to existing schools, minority teacher assignments, optional areas and open enrollment which led the court to conclude that a "segregation policy" was enforced in the Park Hill area were nevertheless viewed by the district court, in their application to other Denver schools, as isolated individual occurrences not demonstrative of a pattern nor indicative of any policy.

The Court of Appeals agreed with the district court both as to segregation policy in Park Hill and as to the lack thereof affecting other Denver schools. 445 F.2d at 990-1002, 1005-07; Appendix, pp. 122a-139a, 147a-150a.

The district court also found that schools which had in excess of 70% black or 70% Spanish-surnamed student enrollments[19] were failing to offer their students educational opportunities equal to those afforded white students in other Denver public schools. 313 F. Supp. at 83, Appendix at p. 89a. Both because the court concluded that the segregated character of the school was the basic (but not exclusive) cause of this unequal offering, 313 F. Supp. at 81, Appendix at pp. 86a-87a, and also because the court found (after a further hearing on the question of remedy alone) that *desegregation* was an *essential* element of any adequate

[19] Some in the Park Hill area and some not.

remedy for these conditions, 313 F. Supp. at 96-97, Appendix at p. 112a, the district court enjoined respondents to desegregate and otherwise equalize the educational offering at these schools.

The Court of Appeals apparently expressed no disagreement with the district court's *findings*, but balked at approving its order because to do so would, it said, amount to requiring desegregation of schools which the district court found had not been segregated by official policy. This, said the Court of Appeals, would require that it overrule *Downs* v. *Board of Educ. of Kansas City* 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), and it declined to do so.[20]

[20] The Court of Appeals accepted the lower court's finding that leaving the schools segregated would mean continued lack of educational opportunities for their students, as well as the finding that to achieve equal opportunities would require desegregation as well as compensatory programs (both of which the district court ordered). But it then held that since desegregation alone would not suffice, it should not be required at all. (445 F.2d at 1004, Appendix at p. 144a).

## REASONS FOR GRANTING THE WRIT

### I.

### Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Lower Courts.

The issue in this case is not *de facto* versus *de jure* segregation.[21] Whatever the term "de facto" may mean, this case involves a school district in which segregation has been brought about by regular, systematic and deliberate choice of the school authorities.

This is the first case of this sort before this Court from an area where officially required segregation was not previously authorized by statute. *Cf. Gomperts* v. *Chase*, No. A-245 (September 10, 1971) (Mr. Justice Douglas, Circuit Justice). But the lower courts have had a significant amount of litigation involving segregation imposed by government —but not by State law. *E.g., Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed*, 288 F.2d 600 (2d Cir.), 195 F. Supp. 231 (S.D.N.Y.), *aff'd* 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *Clemons* v. *Board of Educ. of Hillsboro*, 288 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501 (C.D. Cal. 1970); *Davis* v. *School Dist. of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir. 1971); *Bradley* v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945 (6th Cir. 1971), Civ. No. 35257 (E.D. Mich., September 27, 1971); *Johnson* v. *San Francisco Unified School Dist.*, Civ. No. C-70-1331 SAW (N.D. Cal., July 9, 1971), *stay denied sub nom. Guey Heung Lee* v. *Johnson*, —— U.S. ——, No. A-203 (August 25, 1971) (Mr. Justice Douglas, Circuit Justice);

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[21] In *Swann*, this Court referred to "so-called 'de facto segregation.'" 402 U.S. at 17.

*Soria* v. *Oxnard School Dist.*, 328 F. Supp. 155 (C.D. Cal. 1971); *Oliver* v. *Kalamazoo Bd. of Educ.*, No. K88-71 (W.D. Mich., August 19, 1971) (oral opinion), *aff'd*, No. 71-1700 (6th Cir., August 30, 1971); *cf. United States* v. *Board of School Comm'rs of Indianapolis*, Civ. No. IP-68-C-225 (S.D. Ind., August 18, 1971).

Such cases are, of course, different from the so-called "de facto" suits. *See Bell* v. *School of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *cf. Downs* v. *Board of Educ. of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).[23]

The cases in which the lower courts have determined that a school district has maintained a policy of segregation should be governed by the same rules, regardless of geography or the source of the official segregation, as cases where the initial source was State law. But there is a division among the lower courts; and this is reflected in

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[23] These suits involved a variety of different claims—including, in some of them, a claim not raised here and expressly reserved in *Swann* (402 U.S. at 23): "whether a showing that school segregation is a consequence of other types of state action, without *any* discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree" (emphasis supplied). The reference in text is to that claim, rejected by the Courts of Appeals, and not to the factual claims—also rejected on the records in those cases—that a segregation policy was enforced by the school board.

We submit parenthetically that *Bell* and *Downs*, which involved the disestablishment of relatively recent prior state-imposed dual school structures, would probably have been decided differently in light of *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) and *Swann*. *Compare Bell* v. *School City of Gary*, 324 F.2d 209 (7th Cir. 1963) *with United States* v. *Board of School Comm'rs of Indianapolis*, Civ. No. IP-68-C-225 (S.D. Ind., August 18, 1971); *compare Downs* v. *Board of Educ. of Kansas City*, 336 F.2d 988 (10th Cir. 1964) *with United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970).

the opinions of the courts below in this case, applying different rules to different geographical parts of the same school system. Whereas this Court and the lower courts require desegregation throughout a southern school district where segregation was imposed by law (even though it persists only in certain portions of that district), the lower courts here (and in some other places) have confined desegregation to discrete areas where particular segregating deeds have been uncovered and identified.[13]

Consideration of the Park Hill area schools separately from the rest of the Denver school system resulted from the lower courts' insistence that petitioners demonstrate a segregating act at every school in order to justify relief.

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[13] A similar position has been taken by some lower courts in interpreting *Swann's* directive that "[t]he court[s] should scrutinize such [remaining black] schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26. See, e.g., *Mapp* v. *Board of Educ. of Chattanooga*, Civ. No. 3564 (E.D. Tenn., July 26, 1971); *Calhoun* v. *Cook*, Civ. No. 6298 (N.D. Ga., July 28, 1971). But we do not understand *Swann* to require a complex sociohistorical analysis of residential patterns by district courts in order to determine the relative impact of segregated schools' influence upon segregated housing patterns, and segregated housing patterns' influence upon school segregation. If that were indeed necessary, there would be no need of the presumption against one-race schools which *Swann* announces—and announces precisely for the reason that the school-related and other influences upon housing patterns in a school district cannot be neatly separated and evaluated as independent causal factors. The inquiry is whether the effects and vestiges of segregation were ever disestablished with the thoroughness required by the remedial principles announced in *Swann;* if not, then all remaining vestiges must be eliminated. We submit that the District Court stated the correct rules in *Mannings:*

> There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary housing patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough County have been

This narrow focus facilitated compartmentalized consideration of different areas of the district.[24] But the court's concern should have been school authorities' actions anywhere in the district creating or maintaining racial and ethnic segregation. As the Court of Appeals for the Sixth Circuit said—correctly, we submit—in reviewing a similar case, *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573, —— (6th Cir. 1971), *aff'g* 309 F. Supp. 734 (E.D. Mich. 1970):

> We observe, as did the District Court, that school location and attendance boundary line decisions, for the past 15 years, more often than not tended to perpetuate segregation. Attempted justification of those decisions in terms of proximity of school buildings, their ca-

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set aside for black students and others for white students. With exceptions these schools remain racially identifiable. Over the years defendants have submitted numerous plans for desegregation, not one of which has altered the naked fact that most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only miniscule numbers of blacks. The Court has been unable to locate a single instance in the record where defendants took positive steps to end segregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the Court concludes that what resegregation there has been is a consequence of the continued existence of schools identifiable as white or black.

*Mannings* v. *Board of Public Instruction of Hillsborough County*, Civ. No. 3554-T (M.D. Fla., May 11, 1971) (slip opinion at p. 39).

Where a policy of segregation is established for which the constitutionally required corrective action has not been taken, the presumption against one-race schools is not rebutted by a claim that, independent of the discriminatory school board action, other factors might have produced the segregated situation.

[24] Just as in *Davis* v. *Board of School Comm'rs of Mobile*, 402 U.S. 33 (1971), this Court indicated that the scope of the inquiry into remedy should be system-wide, so we submit should the scope of the inquiry into the matter of constitutional violation be system-wide.

pacity, and safety of access routes requires inconsistent applications of these criteria. Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years.

*Accord, United States* v. *School Dist. No. 151*, 286 F. Supp. 786 (N.D. Ill. 1967), *aff'd* 404 F.2d 1125 (7th Cir. 1968), *on remand*, 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *Taylor* v. *Board of Educ. of New Rochelle, supra.*

In finding actionable segregation in the Park Hill schools, the courts below applied the rule declared in *Brewer* v. *School Bd. of Norfolk, Virginia*, 397 F.2d 37 (4th Cir. 1968), enforced in, for example, *Davis* v. *School Dist. of Pontiac, Michigan*, 309 F. Supp. 734 (E.D. Mich. 1970),[25] and accepted by this Court in *Swann*, 402 U.S. at 7, 20-21, that school officials may not through school construction and the drawing of attendance boundaries which follow racial residential patterns, create segregated schools. Erroneously, however, the lower courts did not apply that rule when they considered other Denver schools, but excused segregatory acts on the grounds that they were "remote in time" and that intervening population shifts, not such acts, resulted in the present racially or ethnically identifiable status of affected schools. 313 F. Supp. at 75, 445 F.2d at 1006, Appendix at pp. 71a-72a, 148a-149a. *Cf. Calhoun* v. *Cook, supra.* While population shifts are of course a factor, so also are the school authorities' dis-

[25] See, *e.g.*, *United States* v. *Board of Educ., Tulsa*, 429 F.2d 1253 (10th Cir. 1970).

criminatory practices, see *Indianapolis, supra*—and no court is equipped to make (nor are litigants equipped to present a sufficient basis for) the fine sociological judgment as to the relative influence of the two factors upon the present racial complexion of a school.[26]

During the 1950-1960 period, the school district was locating and constructing new schools on the expanding periphery of the district, away from black population centers, and thus providing easy refuge for white students who desired to avoid attendance at the minority schools the district was helping to create. When both aspects of the policy are considered, we think it hard to imagine that the school district's segregatory acts did not play a role, perhaps the major role, in creating the existing segregated schools in Denver.

The courts below also excused segregation in the Denver core city area because they held that while the *effect* was clear, petitioners had failed to prove *intent*. 313 F. Supp.

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[26] As the district court in the Detroit (*Bradley* v. *Milliken*) case recently put it:

> We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. . . .
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> 6. Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The Board's building upon housing segregation violates the Fourteenth Amendment. See, *Davis* v. *Sch. Dist. of Pontiac, supra*, and authorities there noted.

*Bradley* v. *Milliken*, Civ. No. 35257 (E.D. Mich., September 27, 1971) (typewritten opinion at pp. 22, 24).

at 75, Appendix at p. 71a, 445 F.2d at 1006, Appendix at p. 149a. See Petition for Writ of Certiorari, *Wright* v. *Council of the City of Emporia*, O.T. 1970, No. 70-188. This is an obvious failure to apply the traditionally stringent equal protection doctrine that the state must justify, by showing a compelling interest,[37] conditions amount to racial classifications, regardless of intent. *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (per Mr. Justice Clark), *cert. denied*, 401 U.S. 1010 (1971); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (*rehearing en banc granted*); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1969); *Lee* v. *Macon County Bd. of Educ.*, No. 30154 (5th Cir., June 29, 1971); *Stout* v. *Jefferson County Bd. of Educ.*, No. 29886 and 30387 (5th Cir., July 16, 1971). No specific intent was required by the courts below in finding that respondents had caused the Park Hill area segregation.

Finally, we submit, and in clear contradiction to established law, the Court of Appeals chose to ignore (despite F.R. Civ. P., Rule 52) the deliberate pattern and policy of the school district, continuing until at least 1964, of assigning minority race teachers to schools in which minority students were concentrated because it gave minority students role models to emulate. 445 F.2d at 1007, Appendix at p. 150a. Other courts have long rejected any such proposed educational justification for unconstitutional segregation. *E.g.*, *Dove* v. *Parham*, 282 F.2d 256, 258 (8th Cir. 1960). And it is clear that such faculty assignment practices are violative of the Fourteenth Amendment. *Swann*, *supra*, 402 U.S. at 18; *Bradley* v. *School Bd. of Richmond*,

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[37] We doubt that any such interest exists to justify segregation in the public schools. *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). *Compare* 445 F.2d at 1006, Appendix at p. 148.

382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Green* v. *County School Bd.*, 391 U.S. 430, 435 (1968). Indeed, a school district's faculty assignment policies are a reliable indication of its overall policy goals since there can be no independent justification (such as that claimed for "neighborhood schools") for a pattern of racial assignments, all teachers being subject to assignment by the district at its discretion. *See, e.g., United States* v. *School Dist. No. 151, supra; Davis* v. *School Dist. of Pontiac, supra; Meredith* v. *Fair*, 305 F.2d 360 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

The simultaneous application of contradictory standards by the courts below leads to anomalous results. Thus, for example, both Manual and Barrett were built in black neighborhoods at the extreme eastern edges of their mandatory attendance zones, which zones were drawn so as to exclude white residential areas. Barrett Elementary School opened all black; Manual High (a larger facility) enrolled nearly all the city's black high school students and was the only minority-white school in Denver when it opened. Yet the tests of intent, remoteness and intervening cause, and popular consensus, were deemed relevant only to Manual but not to Barrett.

To desegregate a few schools but leave others as they are, against the background of segregation brought about by the school authorities, will do nothing to assuage the difficulty. Instead, this partial solution, like the partial solutions of free choice and limited rezoning, will result only in further impaction of the existing segregation. *Mannings* v. *Board of Public Instruction of Hillsborough County, supra*, n. 23.[21]

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[21] See, *e.g.*, *Racial Isolation in the Public Schools*, A Report of the U. S. Commission on Civil Rights (1967); *Report of the National Advisory Committee on Civil Disorders* (1968); Coleman, *Equality of Educational Opportunity* (1966).

The courts below limited the remedy by applying to the same lawsuit conflicting rulings of other courts which have passed upon similar matters. Thus this case is affected more than any other by those conflicts, which should be resolved by this Court in order to establish a uniform approach to school desegregation, North and South.

## II.

### Other Inequalities in the System, Coupled with Racial Segregation, Provide Further Reason for Requiring the Only Workable Remedy: Racial Integration.

Moreover, here the harm of segregation is compounded by educational inequality of other sorts. The district court found that the educational opportunities available to minority race students relegated to predominantly minority schools in Denver were far below the general level of education in the district. The court applied traditional equal protection analysis and found this practice created a racial classification of students in Denver for which no compelling justification could be demonstrated. Therefore, the court required both desegregation and provision of special programs at these schools in order to equalize educational opportunity for their students. The district court took this step not on the basis of any untested assumptions but after careful consideration of the testimony offered by the parties at a hearing directed toward establishing the appropriate remedy for the constitutional deprivation.

The Court of Appeals reversed this part of the district court's order. We think the Court of Appeals misconstrued the basis of the district court's ruling, but, moreover, its own opinion drains the concept of equal educational opportunity (recognized by this Court in *Brown*) of its meaning by declaring segregation-related inequalities irremediable

in the federal courts unless that segregation is proved to have been caused *entirely* by school authorities.

We have argued above that both the Court of Appeals and the district court applied erroneous legal principles in ascertaining the existence and extent of state-imposed segregation in the Denver public schools, and what remedy must follow. If we are correct, then the schools which were ordered desegregated by the district court because they were failing to offer an equal educational opportunity must be desegregated anyway. We believe, however, that irrespective of the Court's conclusion on that subject, the district court's order—that tangible inequalities should be remedied by desegregation—was otherwise proper and should have been affirmed.

The district court's finding of unequal educational opportunity rested upon petitioner's demonstration that (a) there were certain tangible, measurable differences in the school system's allocation of resources to predominantly minority schools, e.g., teacher experience differentials in favor of white schools and generally older and smaller facilities at minority schools; (b) there were as well tangible, measurable differences in educational outcome measures between the same two groups of schools, e.g., characteristically lower achievement test scores and higher pupil dropout rates at minority schools and a progressive regression in the academic progress of the minority child from lower to higher grade levels in the minority schools; and (c) the weight of expert opinion was that measured differences in educational outcomes of the sort found in Denver were not the result of differences in innate ability but of the composition of the student body at predominantly minority schools. Petitioners' expert witnesses[21]

[21] Dr. Dan Dodson, Dr. Neil Sullivan, Dr. James Coleman and Dr. Robert O'Reilly.

testified at length about the *intangible*[30] educational disadvantages which result from racially concentrated minority group schools. In sum, petitioners' expert witnesses testified that the observed inequalities were due to factors *within the control of the school system*, including the composition of the student bodies at various schools.

The district court concluded that no compelling justification for the systematic deprivation of educational opportunity[31] to minority race students[32] had been

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[30] The testimony was undisputed that segregation produces feelings of isolation, inferiority and powerlessness in the minority children; produces low academic expectancy among teachers which then becomes a self-fulfilling prophecy of low achievement; produces low morale among both pupils and teachers, and a high rate of teacher turnover as most teachers sought to escape these schools at the first opportunity.

[31] Petitioners have never claimed nor did the district court's decision in any way rest upon some notion that educational opportunity was solely related to, or demonstrated by, an equivalent performance by every student. Obviously students will have, on an individual basis, different aptitudes and will perform, ideally, to the full extent of their varying capabilities. What is significant about the tangible measures of output here, such as achievement test scores, is two things. *First*, they establish a consistent and systematic differential between white schools and minority schools of such magnitude as to vitiate any suggestions that the observed pattern is merely the result of the interplay of different individual capacities. *Cf. Stell* v. *Savannah-Chatham Board of Education*, 318 F.2d 425 (5th Cir. 1963), 333 F.2d 55 (5th Cir. 1964). *Second*, they confirm the testimony of petitioners' expert witnesses that such segregated schools characteristically produce educationally undesirable effects upon the children and the teachers and can be expected to adversely affect the educational opportunity afforded the students.

[32] The "70%" limitation of the district court as well as his refusal to require relief to schools which had less than 30% white students but also less than 70% black or 70% Spanish-surnamed students, were of the court's own fashioning. Although petitioners raised the combined minority-race school issue on appeal to the Tenth Circuit, that court did not pass upon it and a remand for that purpose upon disposition of this cause upon this Petition would be appropriate.

shown,[33] and the court, therefore, ordered corrective measures—including desegregation (which petitioners' expert witnesses had testified was essential if the major cause of the inequality—segregated schools—was to be eliminated).

Thus, the district court's order gave substance to the constitutional guarantee of equal educational opportunity. *Cf. McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The Court of Appeals, however, imposed a purely extraneous limitation upon this remedy for a constitutional deprivation. To some extent, the Court of Appeals' ruling is based upon a misconstruction of the district court's ruling but, even accepting its reading of the lower court opinions, the Court of Appeals has plainly held that there is no remedy for the unconstitutional deprivation of educational opportunity to minority race students if execution of that remedy would conflict with a school system's adherence to the "neighborhood school" assignment policy.

On either ground, the decision is wrong and ought to be reviewed by this Court because of the national implications of a ruling that the Constitution provides no remedy for the racially unequal provision of education by the state.[34]

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[33] *Cf. Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1963); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). See also *Gomperts* v. *Chase*, —— U.S. ——, No. A-245 (Sept. 10, 1971) (Mr. Justice Douglas, Circuit Justice).

[34] But see *Serrano* v. *Priest*, No. L.A. 29820 (Supreme Ct. Cal., August 30, 1971) (*en banc*).

## CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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